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Supreme Court of the United States

OCTOBER TERM, 1943

No. 175 - 179

ANTOINETTE D. ANDREWS, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BERTHA A. RAINEY and AQUILA W. SWEENEY, as Executors of CHARLOTTE L. ANDREWS, deceased, *Petitioners,*

v.

SAME, *Respondent.*

BERTHA A. RAINEY, *Petitioner,*

v.

SAME, *Respondent.*

MARY A. STODDARD, *Petitioner,*

v.

SAME, *Respondent.*

BELLE ANDREWS, *Petitioner,*

v.

SAME, *Respondent.*

PETITION AND BRIEF FOR CERTIORARI

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PETITION FOR CERTIORARI

To the Honorable the Justices of the Supreme Court of the United States:

The above-named petitioners by their counsel respectfully pray that in pursuance of the jurisdiction granted to this court by Judicial Code §240(a) a writ of

certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review so much of the decisions herein of that Court reversing the Board of Tax Appeals (135 F. 2d 314) as remanded for reconsideration of 1936 fair market value of interest scrip.

That Court on April 20 1943 reversed as excessive and without substantial supporting evidence, the decision herein of the Board of Tax Appeals that Associated Gas & Electric Company scrip (for 1933-1936) interest received by petitioners in 1936 (under protest and never used or sold R. 37, 55-56, 100, 105, 160) but not maturing until 1941 and then only on obviously formidable conditions which never were fulfilled and became impossible of fulfilment on January 10 1940 by bankruptcy (R. 160, 122-123, 110), was taxable income for 1936 at a valuation of 35; and remanded to the Tax Court to reconsider valuation, with leave to receive further evidence. That remand was adhered to over our petition for rehearing. Our scrip was $345,000 out of a total of $10,440,000 issued in 1936, (R. 107). (In 1937 more was issued which will be controlled by the outcome here.)

The following is a summary of the questions presented and of the reasons relied on for allowance of the writ, each whereof is believed to affect an important feature of federal income tax law and in each instance the Circuit Court of Appeals necessarily decided adversely to appellants contrary to applicable decisions of this Court or in other Circuits:

(1) Whether interest scrip payable only in future years and only on conditions of obvious and actual seriousness which because of the maker's precarious financial condition could never (as held) be fulfilled or the scrip paid, could be 1936 income to petitioners on a cash basis.

(2) Whether such scrip, which was merely a contingent acceleration from 2002 to 1941 of unearned and unmatured interest for 1933-1936, was "property" in our hands within the tax law or whether its receipt was "derivation" or "realization" of income.

(3) Whether such scrip could have any fair market value in 1936 regardless of possible vendibility.

(4) Whether mere vendibility, as a test of fair market value, could herein override said intrinsic and extrinsic qualities of said scrip.

(5) Whether, the pleadings and procedure being sufficient, respondent is estopped to assert any 1936 fair market value of said scrip by reason of his having imposed colossal jeopardy assessments and liens of $51,000,000 on the company in December 1935 which remained in litigation until July 1939 shortly before the company went into voluntary bankruptcy where it still is.

(6) Whether prices on a market of the character found to exist here (viz. a narrow and limited over-the-counter market, composed of three or four traders, and maintained by insiders for purposes unrelated to the scrip) can be an adequate test of fair market value of what the market is unrelated to.

(7) Whether the pure speculation and conjecture, which the Court found must be resorted to here, for any finding of vendibility or prices thereon, would be permissible herein.

(8) Whether the right of the company to "pay" interest in scrip and our failure to reject the scrip, made it taxable income.

Respondent's own act (which was duly pleaded and pressed as an estoppel, R. 13, 182) contributed to the impossibility of any 1936 fair market value viz. his jeopardy tax assessments and liens in December 1935 (against the scrip maker) in the sensational amount of $51,000,000 (R. 133-137) which were in litigation for nearly four years until six months before said maker went into voluntary bankruptcy where it still remains (R. 102, 110) without possibility (as we believe) of the scrip being recognized to any extent in the reorganization.

The scrip itself (issued on 6% conv. obligations which provided that interest thereon was payable only conditionally until maturity of the principal in A. D. 2002 when all unpaid interest was to mature with the principal, R. 102-103, 140-145) provided that it should be payable in 1941 "only if and when the company shall have paid or provided for the payment of all senior indebtedness (therein defined) that shall then be due and payable, and if at the time this certificate shall become payable the company shall be bankrupt or insolvent or in liquidation, then only if and to the extent that there shall be assets of the company remaining after all senior indebtedness whether or not then due and payable shall have been paid or provided for" (R. 108, 123, 157). The amount of that senior indebtedness which would be due by 1941 might be as much as $150,000,000 (R. 69, 70-74, 76-77, 83, 85, 133-137; Exh. 9 pp. 10, 22-23, 26-27), and its certain minimum was over $22,000,000 exclusive of the jeopardy assessments (principal $3,810,000, R. 75-76, 83; Exh. 9, p. 31; interest $18,467,452.82, R. 76-77; Exh. 9, pp. 10, 27).

The uncontroverted evidence also showed that the scrip never had any earned assets behind it but only a decrease in indebtedness from buying up outstanding ob-

ligations at a discount (R. 88-89); that against our said protest the scrip was issued in order to "pay" interest since 1933 on said 6% convertible obligations (R. 106, 112-118, 156) which interest never legally matured because of said contingencies in the obligations themselves; that the company was without funds (it had exactly $1,358.30 R. 87; Exh. 9, p. 22); that for 1936 (the system's best year since 1932, R. 90, 157; Exh. 9, p. 30) it was in the red for over $210,000 without taking into account large current debts (R. 87; Exh. 9, p. 23), and had paid no dividends since 1932 (R. 111) nor any interest since 1933 (R. 108) on its 6% convertible obligations which we held; that an involuntary bankruptcy proceeding against it was pending and not settled until 1937 (R. 139); that it was at loggerheads with the Government and the SEC over taxes and for failure to comply with the Public Utility Act of 1935 (R. 133-137, 59, 61; Exh. 9, pp. 3, 7) which was regarded as a grave menace and the litigation to declare it unconstitutional was being carefully followed (Exh. 9, pp. 7, 3); that its taxes, social security expenses, fall in rates and other outlays were increasing faster than intake (Exh. 9, pp. 3, 4, 12); that the company had no expectation of paying the scrip from earnings but only from marketing a further issue in 1941 (R. 88-89); and that in December 1935 respondent himself had filed the aforesaid $51,000,000 jeopardy assessments and liens for the years 1927-1933 (R. 133-137) whose compromise in July 1939 at $8,700,000 (R. 102) was followed in six months by voluntary bankruptcy as aforesaid (R. 110).

The Court held "it indubitable that those contingencies could never have been satisfied, so that we know that the scrip could never be paid"; but that that didn't matter if the scrip could have been marketed, which was said to be "indicated" by Mr. Justice Jackson's memorandum as General Counsel of the Bureau of In-

ternal Revenue (G. C. M. 14482); and expressly recommended that in considering fair market value the notion of value should be discarded in statute and decision as meaningless because of philosophic disputes, and that the notion of intrinsic value should similarly be discarded as merely adding to the confusion, and that mere vendibility should be substituted therefor.

On the possibility of our scrip being vendible, we make no claim of error. The market was sustained by insiders (R. 94, 77). The entire Court concluded that such market was made by those insiders for some ulterior purpose not connected with the scrip itself. The majority of the Court (and the minority too) held that "how much (of our scrip) could have been sold, and at what prices, even in the first year is purely speculative. What the total price would have been over the two years must rest on the flimsiest sort of guesswork".

Nevertheless the Court held such market an adequate test of fair market value if our scrip could have been sold thereon, and that the limited and peculiar nature of the market was irrelevant except as affecting the possibility of sale—which possibility in turn depended on whether and to what extent those insiders would have continued to support the market if our scrip had been offered; and the answer was expressly conceded to be "purely speculative" and the "flimsiest guesswork".

The opinion said that on such a market all "shady practices" by the *seller* must be excluded. But the *buyers'* ulterior purposes which maintained the very market itself were not only tolerated but held not to disqualify as a test (even an exclusive test) of fair market value.

Thus, by the remand, the Court necessarily decided (despite our appropriate assignments of error 1, 2, 3, 11, 15, 19, 22; R. pp. 180-184) not only that the scrip was

'property' 'realized' or 'derived' and can and will be taxable if hereafter found to have been vendible at an ascertainable price, but that (regarding vendibility and price) speculation and conjecture by the Tax Court have an admissible place here—where, contrary to Estate Tax cases, the Treasury could get its proper tax in any later year upon realization; that we must submit to such speculation although the intrinsic and extrinsic qualities of the scrip and of the company, made certain that the scrip could never be paid; that a non-exchange over-the-counter market composed of three or four traders dealing in small lots, and maintained by insiders "by devious devices" for ulterior purposes "unrelated to the scrip itself", is not only an adequate test of the fair market value of what it is unrelated to, but is the exclusive test as against every intrinsic and extrinsic quality of the scrip and its maker; and that possible prices thereon for 2 years after 1936 are competent on fair market values in 1936.

~~The remand also necessarily decided that for income tax purposes such scrip was "property" despite its being merely an iteration (still contingent) to pay the same interest to the same person in 1941 (instead of 2002), and despite the certainty that it could never be paid; and that receipt of such scrip was "realization" or "derivation" of income.~~

The remand also expressly decided that although the scrip was issued and delivered against our desire and despite our protest and without the surrender of coupons therefor, yet our failure to reject and return the scrip made it a "payment" for tax purposes because the underlying obligation permitted interest "payment" in "securities".

All those rulings if followed would completely change the previously declared federal tax law in respect to

conditional obligations and fair market value and its criteria; and are in conflict with applicable decisions of this Court and in other Circuits as more fully cited in the annexed brief.

WHEREFORE petitioners pray that this Court in accordance with its rules and practice and §240(a) of the Judicial Code require these causes to be certified to it for the purpose of reviewing the said remand to the Tax Court.

July, 1943.

Respectfully submitted,

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BRIEF

Opinions delivered herein below: 135 F. 2d, 314; 46 BTA 607.

The grounds on which the jurisdiction is invoked, and the errors intended to be urged, are set out in the petition at pp. 2-3 herein and numbered 1-8 inclusive. The material facts, with references to pages of the Record, are also set out n the foregoing petition.

The material Statute and Regulation are R. A. 1936 §22(a) reading, "also from interest * * * derived from any source whatever"; and Reg. 94, Art. 22(a)-1 reading, "income may be in the form of cash or property".

I.

The decision that the scrip *can* be 1936 taxable income and *can* have 1936 fair market value despite its express contingencies and the precarious condition of the company making certain, as held, that the contingencies could not be satisfied nor the scrip paid, is contrary to the following decisions in this Court and in other circuits:

Burnet v. *Logan*, 283 U. S. 404, 412-413:

"Nor does the situation demand that an effort be made to place according to the best available data some approximate value upon the contract for future payments. This probably was necessary in order to assess the mother's estate * * *. The liability for income tax ultimately can be fairly determined without resort to mere estimates, assumptions and speculation. When the profit, if any, is actually realized, the taxpayer will be required to respond. The consideration for the sale was * * * the promise of future money payments wholly contingent upon facts and circumstances not possibly to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value. * * * Some valuation—speculative or otherwise—was necessary in order to close the estate" (of taxpayer's mother who bequeathed some of the same claim).

Helvering v. *Tex-Penn Co.*, 300 U. S. 481, 499:

"In the peculiar circumstances of this case, the shares of Transcontinental stock, regard being had to their speculative quality and to the terms of

a restrictive agreement making a sale thereof impossible, did not have a fair market value, capable of being ascertained with reasonable certainty, when they were acquired by the taxpayers. In the absence of such value, the ownership of the shares did not lay the basis for the computation of a gain at the time they were received, or for a tax as of that date under the applicable statute."

North American Oil Co. v. *Commissioner*, 286 U. S. 417, 423:

"The company was not required in 1916 to report as income an amount which it might never receive * * *. There was no constructive receipt of the profits by the company in that year, because at no time during the year was there a right in the company to demand that the receiver pay over the money. Throughout 1916 it was uncertain who would be declared entitled to the profits. It was not until 1917, when the District Court entered a final decree vacating the receivership and dismissing the bill, that the company became entitled to receive the money. Nor is it material, for the purposes of this case, whether the company's return was filed on a cash receipts and disbursements basis, or on the accrual basis. In neither event was it taxable in 1916 on account of income which it had not yet received and which it might never receive."

Lucas v. *North Texas Lumber Co.*, 281 U. S. 11, 13:

"Consequently unconditional liability of vendee for the purchase price was not created in that year."

Taylor v. *Comm.*, 89 F. 2d, 465, 468, (7th) c. d. 302 U. S. 727:

"It is true they (the taxpayers) received Liberty bonds in the amount of $145,000 in 1925 but they were to pay therefrom whatever taxes were found to be due for certain years from T. F. Co. The amount of such taxes had been fixed by the Commissioner at $133,917.08. To hold that the petitioners were subject to a tax on the $145,000, although all on a large part of that sum was to be paid the U. S. in satisfaction of its tax claim pursuant to the agreement of the parties, would be both unjust and unlawful. The bonds did not represent gain nor did they represent profit. Until the final determination of the T. F. Co.'s taxes it was impossible to say what if any profits would result. It is well settled that income taxes are concerned only with realized gains * * *. We conclude that 1925 was not the proper year for the inclusion of value of these bonds."

Champlin v. *Comm.*, 71 F. 2d, 23, 25, (10th):

"It is a matter of common knowledge that there is no fair market value for a lawsuit, the outcome of which is as precarious * * *. The truth about the matter is that if Champlin lost the lawsuit this stock was worthless."

Brown v. *Comm.*, 54 F. 2d, 563, (1st):

"Conditional obligations are not income for taxation purposes * * *."

Commissioner v. *Darnell*, 60 F. 2d, 83, (6th):

"We cannot hold that in applying a 'practical test' to the case the taxpayer should return 'as income an amount which it might never receive'."

(viz. payment of notes received for sawmill where taxpayer bound to deliver 14,000,000 ft. of logs per year for three years at fixed prices).

Comm. v. *S. E. Express Co.*, 56 F. 2d, 600, (5th):

"A mere contingent claim, especially a contested one, whether of loss or gain, may never be sustained or realized; it is too uncertain to be considered in making up an income tax return."

Schuster v. *Comm.*, 121 F. 2d, 643, (2nd), infra VIII.

1 Paul & Mertens "Law of Federal Income Taxation" §10.16:

"Bonds, notes and contracts for the payment of money and other property * * * are not the equivalent of cash if they are affected by a genuine contingency as to the time or certainty of performance or amount collectible * * *. The uncertainty affecting bonds, notes and other property * * * may relate to the terms of the contract or the collectibility of payments from the viewpoint of the financial condition of the maker or payor."

The only Department rulings support us notwithstanding in each instance the scrip was unconditional and negotiable. Of those the later is I. T. 3342 (Cum. Bul. 1940-1 p. 58) where interest bearing promissory notes were issued by a corporation to holders of its debentures in exchange for interest coupons covering a five year period, which notes were unconditional promises to pay in cash on a fixed date in a later year and were accepted in satisfaction because the coupons were surrendered in exchange for the new notes. Nevertheless the department ruled that because

"only the interest coupons due on September 1, 1939 represented an existing obligation" therefore "the transaction, instead of effecting a substantial satisfaction of a real and existing obligation, simply amounted to a substitution of notes for coupons payable for the most part in future years. The notes and coupons represented unearned interest, and thus the transaction constituted in effect merely an extension of time for the payment of interest coupons maturing in the future rather than advance payment of such coupons. The notes had no fair market value when received by the holder of the debenture bonds. Under the facts in this case, it is held * * * that the holder of the notes will not be required to include the amounts thereof as income until such payments are received (see generally *Aaron Wolfson* v. *Reinecke,* 72 Fed. 2d, 59; *Merren* v. *Commissioner,* 18 BTA, 156 acquiescence C. B. IX-2, 40 (1930) afd. on another issue 11 Fed. 2d, 44; *Schlemmer* v. *U. S.,* 94 Fed. 2d, 77; *Mellinger* v. *U. S.,* 21 Fed. Supp. 964; and *Great Southern Life Insurance Company* v. *Commissioner,* 36 BTA 828, acquiescence C. B. 1938-1, 13)".

The other Department ruling is GCM 14,182 (XIV-1 CB 152. 153-154) by Robert H. Jackson as follows:

"Scrip may or may not be the equivalent of cash. Where scrip may be used *as a medium of exchange* and is issued in *payment* of interest, it must be treated as the equivalent of cash. Where, however, the scrip is merely *the recognition of an existing liability for interest which the debtor promises to pay at a fixed date in the future,* the fact that tangible written evidence of such liability

> is given the creditor, is not sufficient to constitute the payment of interest. In the instant case, however, the bondholder *surrendered* his right to receive cash in payment of interest due him February , 1933, and *accepted in lieu* thereof an entirely new obligation of the corporation which * * * is a *negotiable* interest bearing obligation * * *. *Presumably* it could have been readily disposed of for cash. To the extent of its fair market value the bondholder has received income in the form of interest. It is concluded therefore that the debtor corporation should file withholding return in accordance with the Revenue Act of 1932." (Italics supplied.)

Set out in the GCM is the scrip certificate in full which was an absolute promise to pay in 1938.

II.

The opinion misinterpreted Mr. Justice Jackson's memorandum as general counsel of the Bureau of Internal Revenue (GCM 14182, CB XIV-1, pp. 152, 152-154). He was discussing only unconditional negotiable scrip accepted in exchange for coupons; and he postulated the scrip as "readily disposable for cash". His memo implies the very opposite of what the opinion assumes.

III.

The decision that vendibility must outweigh every other test of fair market value, is contrary to the following decisions in this Court and in other Circuits (and inevitably leads to arbitrary and unjust consequences noted infra X):

Cases *supra* I; also:

Brown v. *Comm.*, 94 F. 2d, 101, 104 (6th):

"purchases in definance of common sense and generally known and accepted facts, not the first instance undoubtedly where money has been paid for worthless stock".

Owen v. *U. S.*, 8 F. Supp. 707 (Ct. Cl.):

dictum that proof of financial irresponsibility of note-makers would destroy value thereof.

CCH explanation in 432 CCH par. 697.118:

"While a stock may be bought and sold, and so marketed, it is obvious that by use of the phrase 'fair market value' Congress intended that not only must the market price be ascertained by sales, but that the subject matter of the sales and all the attendant circumstances of the sales must be considered to determine whether the sales indicated not alone a market, but a fair price.—CCH."

On the propensity to give undue weight to even Stock Exhange prices, the learned co-author of Paul & Mertens, now Acting Secretary of the Treasury, wrote (Randolph E. Paul "Studies in Federal Taxation" 1937):

"Stock quotations create merely a rebuttable presumption and their presumptive effect can be offset for any reason which points reasonably to the conclusion that the amount of property subject to valuation could not be disposed of at the quoted price (pp. 173-175). The result is not academic; it expresses itself in money deficiencies which taxpayers sometimes are none too well able to afford to pay (pp. 178-179) * * *. If there is any mockery today, it is in the thought that the

amount for which stock is frequently bought and sold is its real value (p. 181). Those who are sufficiently naive may continue to believe, if they wish, that the possibility of realizing revenue may not blunt the sense of truth in government officials (p. 190) * * *. Some escape is necessary from the unreasoning acceptance of market quotations in all cases. If a fiction is necessary for rejecting quotations, or for minimizing the weight to be attached thereto, it would be difficult to imagine a better formula than is afforded by inserting in the definition of market value the necessity of reasonably accurate information on the part of the buyers and sellers who have the dealings resulting in quotations (pp. 197-198). * * * Notwithstanding the existence of actual sales, it is necessary, not only in the extraordinary cases, but also in the ordinary cases, to examine and review the facts and factors which need consideration when there have been no sales (*Heiner* v. *Crosby*, 24 F. 2d, 191, CCA 3, 1928; *St. Joseph Stock Yards* v. *U. S.*, 298 U. S. 38, 58)'' (p. 200).

IV.

The decision that possible vendibility on a limited and peculiar market maintained by devious devices 'for ulterior purposes unrelated to the scrip itself', is even an adequate test of the fair market value of what it is unrelated to is seemingly impossible and opposed to the following decisions in another circuit:

Heiner v. *Crosby*, 24 F. 2d, 191 (3d);

Laird v. *Comm.*, 85 F. 2d, 598, 601 (3d);

Hazeltine v. *Comm.*, 89 F. 2d, 513 (3d).

V.

The opinion and remand also mean that possible vendibility at any time for two years after 1936, would be competent on fair market value in 1936 when vendibility did *not* exist—seemingly a contradiction under even an exclusive vendibility—test.

But whether competent or not, no such exercise of "pure speculation" and "flimsy guesswork" could be "substantial" enough to outweigh the intrinsic and extrinsic qualities of the scrip and the certainty that it would never be paid—see cases *supra* I and *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 491; *Helvering* v. *Price*, 309 U. S. 409, 412; *Powers* v. *Commissioner*, 312 U. S. 259.

VI.

The decision that respondent's own act in December, 1935 imposing (on the scrip maker) jeopardy tax assessments and liens of $51,000,000 which themselves made impossible any 1936 market value (*Champlin* v. *Comm.*, *supra* I), did not estop him from claiming 1936 fair market value, is contrary to the following decisions in this Court and in other circuits:

U. S. v. *Gt. N. Ry.*, 287 U. S. 144, 153:

> "The officials of the government knew precisely what they were doing, and kept well within the statute defining their authority. They did not act illegally like the officials whose acts were challenged in the cases cited by the petitioner. * * * If the payment under their certificate is to be reclaimed, some other ground than mistake or illegality must be found to sustain the reclamation."

Ritter v. *U. S.*, 28 F. 2d, 265, 267 (3d):

"It is true, as plaintiff contends, that when the sovereign becomes an actor in a Court of justice, its rights must be determined by those fixed principles of justice which govern between man and man in like situations. The acts or omissions of the officers of the Government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the Government if the officers have acted within the scope of their authority."

U. S. v. *Denver, etc. Ry.*, 16 F. 2d, 374, 376 (8th):

"The equitable claims of the United States are no stronger than those of an individual under like circumstances, and the United States may be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim."

Dayton Airplane Co. v. *U. S.*, 21 F. 2d, 673, 674 (6th):

"The government was acting by the Secretary of War, in a national emergency of the first class. His discretion was unlimited; it must be exercised through subordinates; in the absence of fraud or bad faith, the exercise of such delegated authority is the Secretary's exercise of it. Rules of estoppel and fair dealing apply in full force as with individuals. In this class of contracts, and for effect on future emergencies, if for no other reason, a sound public policy must require that the government keep its contracts and stand by its settlements as an individual must."

U. S. v. Coast Wineries, Inc., 131 F. 2d, 643, 650 (9th):

"We do not understand appellant to question that these facts would establish estoppel as a matter of law between individuals in the ordinary case but appellant * * * contends that the United States of America can never be estopped by the acts of its agents * * *. The argument and authorities on the question of *res judicata* are persuasive here."

Orange Corp. v. *Comm.*, 131 F. 2d, 662, 663 (5th):

"When such a fact or transaction is projected in its consequences into another year, there is a duty of consistency on both the taxpayer and the Commissioner with regard to it, whether or not there be present all the technical elements of estoppel."

Alamo Bank v. *Comm.*, 95 F. 2d, 622 (5th):

"The Commissioner could not repudiate his action when that value again became a determining factor."

VII.

The decision that we must submit to speculation and conjecture by the Tax Court respecting our 1936 income taxes (as distinguished from estate taxes or March 1, 1913 value, etc.), is contrary to the following decisions of this Court and in other Circuits:

Burnet v. *Logan*, 283 U. S. 404, 412-413 and other cases cited *supra* I.

The "fair certainty" test of *Burnet* v. *Logan* (*supra*)

and the "reasonable certainty" test of *Helvering* v. *Tex-Penn Oil Co.* (*supra*) disqualify and bar "pure speculation" and "flimsy guesswork" required here. The express distinction in *Burnet* v. *Logan* between income and estate taxes (and the speculation respectively permissible therein), would bar in our case much lesser speculation than the "pure" and "flimsy" brand required here.

VIII.

The decision that such scrip was "property" in our hands and that its receipt was 1936 "realization" or "derivation" of income although merely an acceleration (contingent) to pay the same interest to the same person in 1941, was contrary to the following decisions of this Court:

Helvering v. *Horst*, 311 U. S. 112, 115, 118:

> "From the beginning the revenue laws have been interpreted as defining 'realization' of income as the taxable event, rather than the acquisition of the right to receive it. And 'realization' is not deemed to occur until the income is paid. * * * Where the taxpayer does not receive payment of income in money or property, realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him (279 U. S. 716; 281 U. S. 376, 378; 289 U. S. 670). In the ordinary case the taxpayer who acquires the right to receive income is taxed when he receives it, regardless of the time when his right to receive payment accrued."

In that *Horst* case the taxpayer had long previously

received the interest coupons, and if their mere receipt was "property" constituting taxable income, this Court could not have held that "realization" occurred in a later year when he gave the coupons to his son just before their maturity. In effect the *Horst* case extends to interest coupons the examples of absurdity mentioned in the *Shuster* case, *infra;* and by no stretch of the imagination could receipt of our scrip be "the last step by which we obtained the fruition of our economic gain".

The remand was also inconsistent with *Shuster* v. *Commissioner*, 121 F. 2d, 643 (CCA 2d):

> "No word is more loosely used (than 'property') and it is easy enough to find authorities speaking of contracts as 'property', but the consequences of so treating them for purposes of the income tax are absurd. It would follow for instance that all future payments which should become due under a contract of employment must be charged at once at their discounted value; so too of a lease, or of any other contract providing for serial payments. To argue that all these are income as soon as the obligor becomes bound, especially when the tax payer, as here, keeps his books on a cash basis, is so fantastic as to deserve no discussion; it contradicts the fundamental notion that income is 'realized' gain, and would incidentally be unworkable in practice, for substantially all such payments are conditional in obligation as were the quarterly payments in the agreement of June 11, 1128."

IX.

The decision that the company's right to "pay"

interest in scrip, together with our failure to reject and return the scrip, made the scrip taxable income to us, is contrary to the following decisions of this Court and in other Circuits:

> *Old Colony R. R.* v. *Comm.*, 284 U. S. 552, 562:
>
> "Moreover the rules of accounting enforced upon a carrier by the Interstate Commerce Commission are not binding upon the Commissioner, *nor may he resort to the rules of that body made for other purposes, for the determination of tax liability under the Revenue Acts.*" (Italics supplied.)

No more (than in the *Old Colony R. R.* case) could our scrip be made income by being called "payment" in a 6% convertible obligation framed by a maker for its own protection who obviously used "payment" to mean extinguishment of its own conditional obligation rather than beneficial transfer to us.

Really what the company did was to accelerate (conditionally) from 2002 to 1941 the interest for the period 1933-1936, which was then neither earned nor legally due. If it had been called that (instead of "payment") the illegality and injustice of claiming a 1936 tax would have been too apparent for controversy.

For tax purposes our return of the scrip would have been an idle ceremony, for its constructive receipt was unquestionable. Even between the parties its return would have been idle, for (by the 6% convertible obligations themselves) the duty to pay interest (though not a matured duty) would nevertheless have been extinguished or the maturity date advanced from A. D. 2002 to 1941.

Hence the remand also decides that the facts were a satisfactory equivalent for the "agreement" necessary for payment or satisfaction as between the parties (3 Williston on Contracts §1922; *Segrist* v. *Crabtree,* 131 U. S. 287, 289-292; *Mellinger* v. *U. S.,* 21 F. Sup. 964 (Ct. Ct.); *Schlemmer* v. *U. S.,* 94 F. 2d, 77, 2d Cir.) *notwithstanding the "agreed" substitutionary obligation was a contingent and illusory one which we protested.*

X.

The injustice of treating this scrip as taxable income would be fantastic. It was forced on unwilling petitioners for some obscure purpose of high finance, and was never used. It never had any real fair market value and from the moment of its inception was suspect by every canon of sense or reason, to which respondent largely contributed. No one ever pretended it had anything but a gambling chance. For over three years even that pretense has been impossible. It is all on hand and can't be sold and never could be sold unless over a long time by craft and deceit in concealing the effort to unload —repugnant to fair market value. To discover any value, colossal jeopardy assessments and other formidable perils must be ignored, which have long since destroyed the company, as also every contingency in the scrip—all in favor of the bets and odds of a few speculators (or conspirators) in small lots at large discounts; which value must itself certify a prohibitive discount if the scrip were redeemed and a prohibitive price if it was not redeemed, and must certify the conjecture and speculation involved. Many conscientious owners (even if they knew of a market) would not traffic in such chances against themselves or others but would await the contingency period; but according to the remand they must scramble to sell it under peril of either bankruptcy or huge losses

which can't even be mitigated by deduction from future income—a choice really between goldbricking and confiscation or bankruptcy. Unless we had other resources from which to pay the tax we must sell our scrip at a very high discount, which would cost us the discount if the scrip were redeemed; and if not redeemed would have forced us to traffic in chances which might well be considered unconscienable even to the buyer. If we paid from other sources we would lose the tax unless the scrip should be redeemed. In no case could our loss be offset against future income except to a trifling extent; whereas in no case could the Government lose any tax accruing in a later year if the scrip should be redeemed or realized on. Every statute, regulation, decision and ruling must be disregarded to make an assessment. The injustice of the whole proceeding would be incredible and fantastic. We submit the tax law imposes no such intolerable dilemma on citizens.

July, 1943.

Respectfully submitted,

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